STATEMENT OF

ROBERT WORLEY

DIRECTOR, EDUCATION SERVICE

VETERANS BENEFITS ADMINISTRATION

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON ECONOMIC OPPORTUNITY

March 24, 2015

Good morning, Chairman Wenstrup, Ranking Member Takano, and other Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss legislation pertaining to the Department of Veterans Affairs (VA) programs: H.R. 456, H.R. 473, H.R. 475, H.R. 476, H.R. 643, H.R. 1038, H.R. 1141, H.R. 1313, H.R. 1187, and a draft bill to authorize VA to give preference in awarding a contract for the procurement of goods or services to offerors that employ Veterans. Another bill under discussion today would affect programs administered by the Department of Labor. Respectfully, we defer to that Department's views on H.R. 474, "the Homeless Veterans' Reintegration Programs Reauthorization Act of 2015," a bill to provide for a 5-year extension to the homeless Veterans' reintegration programs and clarification regarding eligibility for services under such programs.

Accompanying me this morning are Tom Leney, Executive Director, Small and Veteran Business Programs, Kimberly McLeod, Deputy Assistant General Counsel and John Brizzi, Deputy Assistant General Counsel.

H.R. 456

H.R. 456, the "Reducing Barriers for Veterans Education Act of 2015," would amend chapter 33 of title 38, United States Code (title 38), by inserting a new section, 3315B, after section 3315A. The new section would allow an individual entitled to educational assistance under chapter 33 to also be entitled to educational assistance for the application fee required to apply to an approved program of education at an institution of higher learning (IHL). The total amount of educational assistance payable for applications would be the lesser of the total application fees charged to the individual by the IHLs or $750.

The number of months (and any fraction thereof) of entitlement charged to an individual under this chapter for an application fee would be determined at the rate of one month for each amount that equals the amount determined under section 3315A(c)(2) of title 38.

VA supports legislation that would allow an individual to receive payment for the application fee required to apply to an approved program of education at an IHL. Post-9/11 GI Bill benefits can already be paid for a preparatory course used for admission to an IHL, such as an SAT preparatory course, and the benefits can also be used to reimburse the fees associated with taking such a test. H.R. 456 would assist Veterans and qualifying dependents to use those test results to apply for an approved program at

an IHL. VA also notes that entitlement would be charged for a fraction of a month, thus minimizing the entitlement used prior to pursuing a program of post-secondary education.

VA would need to make modifications to the Benefits Delivery Network (BDN) and the Post-9/11 GI Bill Long Term Solution (LTS) to correctly calculate benefit payments and entitlement charges for IHL application fees. Therefore, VA recommends that H.R. 456 be effective one year after enactment.

VA estimates that there would be insignificant administrative or personnel costs to VA associated with the enactment of H.R. 456 VA estimates that, if enacted, benefit costs would be $23.3 million in the first year, $128.8 million over five years, and $294.4 million over 10 years. Further, VA estimates IT costs associated with the enactment of this legislation would be $2 million. These costs include modifications to LTS and BDN.

H.R. 473

H.R. 473 the "Increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015," would amend chapter 7 of title 38 by adding new sections 715, 717 and 719. These sections would affect Senior Executives, defined as career Senior Executive Service (SES) or Title 38 SES-equivalent employees, who work at VA.

VA has numerous legal concerns about section 715, including concerns arising under the Due Process, Takings, and Ex Post Facto Clauses of the U.S. Constitution. Several of VA's concerns are shared by the U.S. Department of Justice (DOJ) and the U.S. Office of Personnel Management (OPM).

VA also has policy concerns about the implementation of sections 715, 717 and 719. VA is concerned that the provisions in this bill would impede VA's ability to recruit, retain, reward, and manage world-class talent to lead and sustain a transformed VA.

VA has made it clear that it intends to transform VA into an organization that focuses on Veterans. This transformation depends on expert career Senior Executives who are trained and motivated to lead the VA workforce in better, more effective ways. VA Senior Executives include highly-qualified individuals with private-sector business backgrounds, medical doctors and public health care professionals with specialty care and research backgrounds, Veterans, and dedicated employees who have worked their way up through the Civil Service to the senior-most career leadership positions in VA.

VA is already challenged to recruit and retain highly-qualified Senior Executives, in that many Senior Executives take a pay cut to join or stay at VA. For instance, the salary and benefits offered to most VA medical center directors pale in comparison to the compensation package offered for a comparable position in the private sector. This bill, as currently drafted, would compound the challenges facing VA by arbitrarily capping VA Senior Executives' performance ratings, requiring VA to deliver those ratings to Congress while other agencies' executive ratings remain confidential, and requiring VA Senior Executives to change locations and programs every five years. Even the bill's reduction of retirement benefits for VA Senior Executives convicted of certain crimes singles out VA Senior Executives for treatment unparalleled in other agencies. Highly-qualified professionals are less likely to join or stay with VA as Senior Executives when they could serve elsewhere with higher pay and less punitive treatment.

In general, section 715 would reduce the annuity paid to VA Senior Executives who are removed from their senior executive position under 38 U.S.C. § 713, or who leave VA while removal proceedings under section 713 are pending, if they have been convicted of a felony that influenced their performance while employed as a VA Senior Executive.

Section 715 raises a number of constitutional issues. First, the proposed bill raises several concerns under the Due Process Clause of the Fifth Amendment. With respect to procedural due process, the bill does not expressly provide for procedural protections, such as prior notice and a hearing, that would allow VA Senior Executives to dispute a finding that they had been convicted of a felony that "influenced [their] performance while employed in the senior executive position" at VA. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process.").

The bill also raises substantive due process concerns if interpreted to have a "retroactive effect." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). While the bill indicates that section 715 would apply only to removal actions "commencing on or after the date of enactment" of the bill, such actions could potentially be based on conduct predating the enactment of the bill. The Supreme Court has stated that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976). Further, VA Senior Executives might not have received timely notice that the actions that led to their conviction could result in the reduction of their annuity. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness

enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). "Due process requires" that, before depriving a party of property, the Government provide sufficient notice "to warn a party about what is expected of it" and to give the party time to alter its conduct in response. *Gen. Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

Second, OPM might need to collect annuity payments that have already been paid to a retired senior executive. Such collections would implicate the Fifth Amendment's Takings Clause. The Takings Clause prevents the government from "depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Landgraf*, 511 U.S. at 266. In the case of individuals who have already been paid some portion of their annuity payments, those payments, including contributions made by the Government, are the employees' property. An unconstitutional taking would occur if the Government collected a portion of the employees' annuities without just compensation. *See Nat'l Educ. Bd. v. Ret. Bd. of R.I.*, 172 F.3d 22, 30 (1st Cir. 1999) ("Pension payments actually made to retirees become their property and are protected against takings, even if and where the payments are unquestionably a gift.").

Finally, the legislation may raise concerns under the Ex Post Facto Clause. *See Hiss v. Hampton*, 338 F. Supp. 1141, 1148-49 (D.D.C. 1972). The Ex Post Facto Clause prohibits laws that "impose[ ] a punishment for an act which was not punishable at the time it was committed; or impose[ ] additional punishment to that then prescribed." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867). In *Hiss*, a

three-judge panel of the U.S. District Court for the District of Columbia held that a law denying payment of pensions to former employees who falsely testified with respect to Government service was an ex post facto law as it pertained to the conduct of those employees that predated the passage of the law. 338 F. Supp. at 1148-49. According to the court in *Hiss*, "[t]he proper function of [law] is to guide and control present and future conduct, not to penalize former employees for acts done long ago." *Id.* at 1148-49.

Implementing section 715, as written, will also be impractical for VA and the Government. First, section 715 does not specify whether it would apply to felony convictions in Federal or State court. Assuming section 715 will only to apply to convictions in Federal court, the section does not specify the roles and responsibilities of the various Government components that investigate (e.g., VA's Office of Inspector General, Federal Bureau of Investigation) and prosecute (e.g., DOJ) Federal criminal matters. The section also does not address the roles and responsibilities of OPM, the agency that administers Federal retirement systems.

In order for section 715 to work properly, VA would have to be notified that an individual who was removed from VA under section 713 was convicted of a felony. VA would then have to determine that the former employee's conviction influenced his or her performance while employed at VA and also determine the "covered period" applicable under section 715. Next, VA would need to notify OPM, which would have to exclude the "covered period" from the individual's annuity, and recalculate the annuity. Assuming that the individual retired a number of years ago, OPM may also need to collect annuity payments that have already been made to the individual.

Further complicating this matter, an annuity may need to be recalculated by OPM if an individual's conviction is overturned on appeal.

Based on the implementation concerns discussed above, VA is unable to determine the costs for section 715. Significantly, whatever costs would be incurred by VA in making a determination under this section would also result in costs to DOJ, which would have to defend the Government in litigation before the courts, and OPM, which would have to adjust the pension of a VA Senior Executive, and defend its adjustment, if appealed by the employee, before the U.S. Merit Systems Protection Board.

Section 717 would, among other things, require VA to utilize five rating levels for VA Senior Executives and would limit the number of individuals who can receive the top two rating levels ("outstanding" and "exceeds fully successful"). Section 717 would require VA to consider complaints and reports (including pending reports) from various Government agencies when determining the rating of a VA Senior Executive. Section 717 would also require the Secretary to reassign VA Senior Executives once every five years to a position at a different location that does not include the supervision of the same personnel or programs. Under the proposed bill, VA would also be required to contract with a nongovernmental entity to prepare a report on management training for VA Senior Executives. The bill would mandate that VA prepare a plan for implementing the findings in the nongovernmental entity's report.

VA Senior Executive performance ratings are based on an individual's performance. Limiting outstanding performance ratings to only 10 percent of VA Senior Executives, as proposed in the bill, would draw an arbitrary line for Senior Executive

performance that is not based on individual performance. VA's concerns are shared by OPM, which accredits SES performance rating systems for the Government. According to OPM, language imposing a quota on performance ratings for SES undermines OPM's regulatory prohibition against assigning candidates to categories based on percentages. The goal of OPM's regulation is to ensure that SES employees are not being ranked against each other, as a set of prescribed percentages in the bill would require, but each SES employee is rated against the standards to which he or she is being held.

By capping the number of individuals who can receive superior performance ratings, the bill would also prevent the Secretary from meaningfully assessing and rewarding individual executives' innovations and leadership achievements. Instead, the bill would promote mediocrity by presumptively and arbitrarily assigning the majority of VA Senior Executives no better than a passing grade.

Considering complaints and pending reports when reviewing Senior Executive performance also raises concerns about the ability of the employee to respond to management's review of his or her performance, since these complaints or pending reports may not be available to the employee. Moreover, complaints may later be unsubstantiated, and pending reports may be changed before they become final.

Requiring Senior Executives to rotate to different positions every five years may prevent a Senior Executive from fully mastering his or her position and may hinder the recruitment and retention of highly qualified title 38 SES-equivalent VA medical administrators. In requiring periodic rotation, the bill constrains the Secretary's ability to assign executives to locations and programs based on VA's needs rather than an

arbitrary timetable. Ultimately, such a rotation will frustrate the Secretary's efforts to create continuity and stability within VA's operations.

Under the current version of the bill, VA must prepare and report to Congress a plan to implement the recommendations of a report issued by a nongovernment contractor on management training for VA Senior Executives. The requirement that the report be issued by a nongovernmental entity raises issues about duties that are "inherently governmental." An inherently governmental activity is an activity "that is so intimately related to the public interest as to require performance by Federal Government employees." Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(A). While VA may consider the nongovernmental report and report to Congress on the items that it plans on implementing or does not plan on implementing, the inherent authority to implement changes in Government policy and decide which policies should be changed lies with Government personnel and not contractors.

There may also be little value for VA to enter into a contract with a nongovernmental entity to report on VA's management training programs, as VA already works with OPM, which offers cost-free guidance to Federal agencies on management training.

The costs associated with this section are as follows:

- Initial year/first year costs:

Performance Appraisal System:

  - SES Automated System: $850,000
  - GS Automated System: $3,000,000
  - Nongovernment Independent Training (one time cost): $1,250,000

- Five Year Costs:

Performance Appraisal System:

  - SES Automated System: $2,250,000
  - GS Automated System: $5,000,000

SES Relocation

  - Relocation Costs (negotiable per contract) $21,000,000
  - Relocation Costs (required by regulation) $90,000,000

- Ten Year Costs:

Performance Appraisal System:

  - SES Automated System: $4,000,000
  - GS Automated System: $7,500,000

SES Relocation

  - Relocation Costs (negotiable per contract) $42,000,000
  - Relocation Costs (required by regulation) $180,000,000

Section 719 would limit the Secretary's authority to place VA Senior Executives on administrative leave or in any other type of paid non-duty status for more than 14 days during a 365-day period.

While VA does not object to the purpose of section 719, it does have significant concerns about the section, as currently drafted. VA recommends removing "any other type of paid non-duty status" from section 719(a), as this could be construed to mean that sick leave, a type of paid non-duty status, would also be subject to the limitations in this section. VA also recommends that the limitation of 14 days be increased to 60

days, as most administrative investigations that form the basis for disciplinary action take at least 30 days to complete.

VA is unable to determine the costs for this section.

For the reasons stated above, VA has major legal and policy concerns with H.R. 473.

H.R. 474

H.R. 474, the **"**Homeless Veterans' Reintegration Programs Reauthorization Act of 2015," would amend 38 U.S.C. § 2021(e)(1)(F) to extend the authorization of appropriations for the Department of Labor's (DOL) Homeless Veterans Reintegration Programs through fiscal year (FY) 2020. In addition, the bill would amend section 2021(a) to clarify the Veterans eligible for services under these programs.

As noted above, VA defers to DOL for views on this bill.

H.R. 475

H.R. 475, the "GI Bill Processing Improvement Act of 2015," would amend title 38 to make certain improvements in the laws administered by VA relating to educational assistance.

Section 2(a) of H.R. 475 would require VA to make changes and improvements to the Veterans Benefits Administration (VBA) information technology (IT) systems to ensure that, to the maximum extent practicable, all original and supplemental claims for educational assistance under chapter 33 of title 38 are adjudicated electronically and rules-based processing is used to make decisions with little human intervention.

Section 2(b) would require VA to submit a report to Congress on the changes made to its IT systems no later than 180 days after enactment.

Section 2(c) of this bill would authorize an appropriation of $30 million to VA to carry out the requirements of section 2 during fiscal years 2015 and 2016.

VA supports section 2 of H.R. 475. VA has deployed six major releases of the LTS for Post-9/11 GI Bill education claims processing, which is an end-to-end claims processing solution that utilizes rules-based, industry-standard technologies for the delivery of benefits. On September 24, 2012, end-to-end automation of supplemental Post-9/11 GI Bill claims was activated in LTS. Since that deployment, over 6,500 claims are being processed automatically per day with no human intervention. Approximately 80 percent of all Post-9/11 GI Bill supplemental claims are partially or fully automated.

While VA has processing rules and automation for supplemental Post-9/11 GI Bill claims, VA would have to develop and implement those mechanisms for original claims. Initial eligibility determinations for original claims are very labor-intensive. Currently, LTS is in a sustainment phase with only minimal increases in functionality. Further development would allow LTS to automate certificates of eligibility and provide very fast service (possibly one day) for some Veterans who apply for the Post-9/11 GI Bill, as opposed to the current 16-day average processing time. In addition, further development for supplemental claims would allow LTS to produce increased efficiencies in processing through additional automation, while ensuring consistent and timely service to Veterans. The efficiencies gained through increased end-to-end automation would improve overall claims processing timeliness and accuracy.

While VA has no issues with providing a report detailing IT changes, we would require at least 24 months from the date of enactment in order to report on those changes due to the time needed for the procurement process, systems development, testing, and deployment.

There are no mandatory costs associated with this section. Administrative costs are estimated to be $3 million, which includes functional requirements development and project management. IT costs are estimated to be $30 million, which matches the amount the Committee has proposed to authorize for VA in section 2(c) of the bill. If this legislation is enacted and the $30 million is appropriated, those costs would cover enhancements to LTS, to include adding the functionality to fully automate (to the maximum extent possible) all original and supplemental claims with little human intervention.

Section 3(a) of H.R. 475 would change the effective date of section 702 of the Veterans Access, Choice, and Accountability Act of 2014 (VACAA), from July 1, 2015, to July 1, 2016. Currently, section 702 of the VACAA requires VA to disapprove any course of education under the Post-9/11 GI Bill and Montgomery GI Bill-Active Duty at public IHLs if the school charges qualifying Veterans and dependents tuition and fees in excess of the rate for resident students for terms beginning after July 1, 2015, regardless of their State of residence.

Section 3(b) of this bill would provide a technical amendment for section 3679(c)(2)(B) of title 38 to clarify the definition of a “covered individual” as that term pertains to dependents eligible for Post-9/11 GI Bill benefits or to whom entitlement is

transferred under section 3319 of the same title, by removing the reference back to section 3679(c)(2)(A).

VA has concerns about the provisions in section 3.

Section 3(a) would delay the effective date of the provisions in section 702 of the VACAA to allow an additional year for State legislators to enact laws and public educational institutions to make changes to policies. This would reduce the number of programs that would be subject to disapproval by VA.

VA is also concerned with the potential impact of the technical amendment contained in section 3(b) of the bill. The proposed language would change the definition of a "covered individual." By removing the reference back to section 3679(c)(2)(A), it would expand eligibility to include dependents of Servicemembers approved for entitlement transfer by: 1) removing the requirement for a period of at least 90 days of active duty service on the part of the individual from whom benefit eligibility is derived, and 2) removing the requirement for dependents to enroll within three years of the member's discharge. These changes would require additional, corresponding changes to the States' statutory or policy provisions governing resident tuition and fee charges at public IHLs, and it would increase the number of programs that would potentially be subject to disapproval by VA. Because of the need for additional State statutory or policy changes, VA recommends that the provisions in section 3(b) be effective for any quarter, semester, or term, as applicable, that begins one year from the date of enactment, or July 1, 2016, whichever is later.

The Department is still working through the costs associated with this section.

Section 4 of H.R. 475 would add a new section 3326 under subchapter III of chapter 33, of title 38. Specifically, this section proposes to codify the provisions of Pub. L. 110-252, section 5003(c) to bring its requirements into title 38, and also proposes an amendment to those requirements.

The Post-9/11 GI Bill (chapter 33) requires individuals to relinquish eligibility to some other VA education benefit, as applicable, in order to receive the chapter 33 benefits.

Subsections (a) through (g) and subsection (i) of section 3326 are substantially identical to the provisions of section 5003(c) of Pub. L. 110-252, and would make no substantive changes to current law.

VA supports subsections (a) through (g) of new section 3326 as would be added by H.R. 475 since these provisions are, generally, identical to those that were enacted in section 5003(c) of Pub. L. 110-252.

Subsection (h) would provide VA with the authority to make an alternative election for an individual if the election submitted by the applicant is not in his or her best interest. If an individual elects to receive a benefit that is clearly not in his or her best interest on or after January 1, 2016, VA may change the election and must notify the individual of the change within 7 days. The individual would be allowed 30 days from the date he or she received the VA notification to modify or revoke the election made by VA. In addition, VA would notify the individual of the change of election by electronic means whenever possible. This subsection was not included originally in section 5003(c) of Pub. L. 110-252; therefore, it would constitute a new authority.

VA has concerns with subsection (h). Since individuals' situations are different, elections made in the best interest of a Veteran would be highly subjective. While one claims examiner might view an election option as being the best, another might disagree. Therefore, VA recommends specific criteria for an election be added to the legislation that would eliminate subjectivity. For example, in some instances, a Veteran elects to relinquish MGIB-AD benefits to receive chapter 33 benefits when he or she has only a few months of MGIB-AD entitlement remaining. If the individual has more than one qualifying period of service, it may be in that individual's best interest to finish 36 months of entitlement under the MGIB-AD before beginning to receive chapter 33 benefits – the individual could then receive up to 12 months of entitlement under chapter 33. If this situation met the criteria in the legislation as enacted, the Veteran's claim would be processed under the chapter 30 program until his or her entitlement under that program ends.

VA also recommends that H.R. 475 include language to allow VA to make an election in cases where a Veteran or Servicemember applies for chapter 33 benefits and does not elect to relinquish any benefit. This would allow VA to maximize automation, improve processing times, and obviate the need to contact the Veteran for an election.

Further, VA has concerns with the impact this subsection would have on the automation of original claims using LTS. If VA has to make an alternative election under chapter 33 when a Veteran is eligible for more than one benefit, claims' examiners would have to review the majority of chapter 33 original claims. The need for

this review would limit the number of original claims that could be automated through LTS without human intervention.

VA estimates that should H.R. 475 be enacted, benefit costs would be insignificant. Subsections (a) through (g) are provisions that are already in place under section 5003(c) of Pub. L. 110-252 and, therefore, would result in no additional cost.

Due to VA's current outreach efforts, such as the GI Bill Comparison Tool, and the amount of information available to assist Veterans in making informed decisions on education benefits, VA would not anticipate making a significant number of alternative elections. Therefore, anticipated costs to the readjustment benefits account are insignificant. Section 5 would amend section 3684(a) of title 38 to define the term "educational institution" to include a group, district, or consortium of separately accredited educational institutions located in the same State, and which are organized in a manner that facilitates the centralized reporting of their enrollments. This section would also amend section 3684(a) to include individuals enrolled under chapters 32 and 33.

This section would apply to any reports of enrollment submitted on or after the date of enactment.

VA supports section 5. This legislation would allow each institution in a district/consortium to certify a student's enrollment regardless of where the student is matriculated. Furthermore, since school certifying officials at district institutions have access to student records and all courses have universal numbering, VA compliance visits could be done at any institution and records would be available for students who attend any of the institutions included in the group, district, or consortium.

VA estimates that there would be no additional full-time equivalent or general operating costs (GOE) cost requirements associated with the enactment of this section. There would be no additional cost since the reporting fees would be paid to the school that would certify the enrollment, regardless of the location of the institution.

Section 6 would add a new section under subchapter II of chapter 36 of title 38 requiring VA to make available to educational institutions information about the amount of educational assistance to which a Veteran or other individual is entitled under chapter 30, 32, 33, or 35. This information would be provided to the educational institution through an Internet website and would be updated regularly to reflect any amounts used by the Veteran or other individual.

VA supports the intent of providing educational institutions with the amount of educational assistance to which a Veteran is entitled. However, VA does not support providing this information through an Internet website. VA believes there would be privacy and security risks if Veteran information were to be made available in this manner.

Currently, VA provides the amount of a Veteran's entitlement (original and remaining) and other information (i.e., the delimiting date), to the educational institution through the VA Online Certification of Enrollment (VA-ONCE) system. The educational institution in which the student is enrolled can view this information for individuals training under chapters 30, 1606, and 1607 after VA processes an award for education benefits. This functionality is not currently available for Veterans or other individuals training under chapters 32, 33, or 35; therefore, VA would need to make programming changes to VA-ONCE in order to make this information available as well. VA

recommends removing the requirement to provide information for individuals training under chapter 32 from the bill. Chapter 32 usage has decreased by nearly 99 percent, from 560 beneficiaries in FY 2008 to 8 beneficiaries in FY 2014. Because eligibility for chapter 32 ends 10 years after an individual's release from active duty, the majority of those with remaining entitlement are likely also eligible for benefits under chapter 33.

There are no mandatory costs associated with this section. VA estimates that administrative costs for functional requirements development would be $500,000 and IT costs associated with this section would be $5 million. These costs include enhancements to VA-ONCE to provide the newly required information to educational institutions.

H.R. 476

H.R. 476, the "GI Bill Education Quality Enhancement Act of 2015," would amend title 38 to clarify the process of approving courses of education pursued using educational benefits administered by VA.

Section 2 of the bill would amend section 3672(b)(2)(A) of title 38 to authorize State Approving Agencies (SAAs) to determine if a program of education is deemed to be approved if the program is one of the following:

- An accredited standard college degree program offered at a public or not-for-profit proprietary educational institution that is accredited by an agency or association recognized for that purpose by the Secretary of Education.

- A flight training course approved by the Federal Aviation Administration (FAA) that is offered by a certified pilot school that possesses a valid FAA pilot school certificate.
- An apprenticeship program registered with the Office of Apprenticeship, Employment Training Administration, Department of Labor; or a State apprenticeship agency recognized by the Office of Apprenticeship pursuant to the Act of August 16, 1937 (popularly known as the "National Apprenticeship Act"; 29 U.S.C. § 50*,* et seq.).
- A program leading to a secondary school diploma offered by a secondary school approved in the State in which it is operating.
- A licensure test offered by a Federal, State, or local government

This section would also amend section 3675(a)(1) of title 38 to substitute "A State approving agency, or the Secretary when acting in the role of a State approving agency" for "the Secretary or a State approving agency." Further, this section proposes to amend section 3675 to expand the approval of other courses by authorizing a SAA, or the Secretary when acting in the role of a SAA, to approve accredited programs (including non-degree accredited programs) not covered by section 3672 of title 38.

VA supports the clarification of the approval requirements codified in section 3672(b)(2)(A), as detailed in section 2(a) of H.R. 476. In order to be "deemed approved," accredited programs must meet the requirements of a number of provisions in chapter 36 of title 38, United States Code. Consequently, compliance with those provisions must be verified, which the proposed change would make more explicit.

However, in order to be consistent with approval authorities in other sections of chapter 36, VA believes that both VA and the SAA should have approval authority.

VA also supports the change to 38 U.S.C. § 3675 proposed in section 2(b) of the bill, to make those approval provisions apply to accredited non-degree programs at public and private non-profit IHLs that are not covered by section 3672 or by any of the approval requirements currently contained in chapter 36 of title 38. However, VA does not support modifying the current language that maintains approval authority with both VA and the SAA. Pub.L. 111-377 granted VA authority to approve those programs, if necessary. While VA has no plans to take over approvals of all educational programs, it does appreciate this flexibility of authority.

VA estimates that there would be no benefit or administrative costs associated with Section 2 of this bill.

Section 3 would amend section 3676(c)(14) of title 38 as it pertains to the criteria used to approve non-accredited courses. Under this section, in consultation with the SAA and pursuant to regulations, VA would determine if additional criteria may be deemed necessary for the SAA to approve an institution's written application for a course of education. VA and the SAA must treat public, private, and private for-profit educational institutions equitably.

While VA agrees with the intent behind section 3, that the approval requirements for non-accredited courses should be applied equitably regardless of the type of institution providing the training, VA does not believe that it should be interjected into the SAA approval requirements applicable to educational institutions located in the State over which the SAA has jurisdiction. VA is not aware of any widespread concerns

regarding unfair practices or unequal treatment with respect to any existing additional SAA approval requirements. VA is concerned about the amount of resources that it would take to regulate the process, review the SAA requirements, and make determinations regarding necessity and equity. Consequently, VA recommends adding the requirement that any additional criteria treat public, private, and proprietary for-profit educational institutions equitably, without requiring a formal process and a VA decision on each additional requirement. This would ensure the consistent application of additional SAA approval requirements, allow States to promulgate additional requirements for educational institutions located within their borders, and avoid the potentially burdensome administrative process proposed in this section.

The Department is still working through the costs associated with this provision.

Section 4 would amend subsection (c)(1)(A) of section 3313 of title 38 to limit the benefits paid for pursuit of a flight-related degree program at a public IHL. First, it would limit the amount of tuition and fees payable for a program that requires flight training at a public institution to the same amount per academic year that applies to programs at private or foreign IHLs. Second, it would prohibit the payment of fees associated with non-required (i.e., elective) flight training. This section would be effective the first day of a quarter, semester, or term (as applicable) after enactment.

VA supports legislation that would limit the amount of tuition and fee payments for enrollment in flight programs. VA is concerned about high tuition and fee payments for enrollment in degree programs involving flight training at public IHLs. Education benefit payments for these types of programs have increased tremendously with the

implementation of Pub. L 111-377, and in some cases, public institutions seem to be targeting Veterans with their flight-related training programs.

There has been a significant increase in flight training centers, specifically those that offer helicopter training, that have contracted with public IHLs to offer flight-related degrees. Sometimes these programs charge higher prices than those that would be charged if the student had chosen to attend the vocational flight school for the same training.

Additionally, VA has noticed that a growing number of VA beneficiaries are taking flight courses as electives. In most cases, these courses are not specifically required for the Veteran's degree.

VA also notes that section 4, as written, would only exclude the "fees" and not "tuition" related to electives involving flight training at public IHLs. Given that elective flight courses can be very expensive and may not be needed for graduation, VA is unsure why benefits would continue to be paid for tuition for such courses. Only the prohibition of benefit payments for tuition and fee charges associated with elective flight classes would ensure that VA benefits could no longer be paid for pursuing flight training as an elective.

The Department is still working through the costs associated with this provision.

Section 5 would amend section 3693 of title 38 by inserting a new subsection (a) that would require VA to conduct an annual compliance survey of educational institutions and training establishments offering one or more courses approved for enrollment of eligible Veterans or individuals, if at least 20 such Veterans or individuals are enrolled. VA would be responsible for:

- Designing the compliance surveys to ensure that such institutions or establishments, as the case may be, and approved courses are in compliance with all applicable provisions of chapters 30 through 36 of title 38;
- Surveying each of these educational institutions and training establishments not less than once during every two-year period; and
- Assigning not fewer than one education compliance specialist to work on compliance surveys in any year for each 40 compliance surveys required to be made under this section for such year.

Additionally, VA, in consultation with the SAAs, would annually determine the parameters of the surveys, and not later than September 1 of each year make available to the SAAs a list of the educational and training establishments that would be surveyed during the fiscal year following the date of making such list available.

VA supports this section as it would improve the compliance survey process. VA recognizes the importance of compliance work in ensuring timely and accurate payments to Veterans and their families. Accordingly, VA and the National Association of State Approving Agencies (NASAA) formed a joint committee, the Compliance Survey Redesign Working Group (CSRWG), to streamline and enhance the compliance survey process.

Currently, there are approximately 16,000 approved domestic and international IHLs and non-college degree (NCD) institutions. Of the 16,000 institutions, there were 11,260 active institutions in calendar year 2013. During FY 2013 and FY 2014, VA and SAAs completed well over 10,000 surveys, with just over 5,000 surveys completed in

FY 2014. VA anticipates completing a similar number of reviews in 2015. This work will be split roughly in half between VA and SAAs, as it has been for the last few years.

Under current statutory requirements, VA is required to conduct annual surveys at 100 percent of schools with greater than 300 beneficiaries and NCD programs. Schools with high numbers of beneficiaries are more likely to have one or more full-time school certifying officials and may not need a visit annually. Institutions with a smaller number of beneficiaries are more likely to have school certifying officials who have other duties, and these institutions may not be as well-versed in school certifying official requirements, especially as they relate to the Post-9/11 GI Bill program.

VA estimates that the GOE cost requirements associated with the enactment of section five of this legislation would be insignificant. There is no benefit costs associated with section five.

H.R. 643

H.R. 643, the "Veterans Education Survey Act of 2015," would direct VA to enter into a contract with a nongovernment entity to conduct a survey of individuals who have used or are using their entitlement to educational assistance under chapters 30, 32, 33, and 35 of title 38 to pursue a VA program of education or training.

The bill would require: (1) the survey to be submitted to the Senate and House Veterans' Affairs Committees (Committees) not later than one month before the collection of data begins, and (2) the entity to conduct the survey electronically or by other appropriate means and to complete the survey and submit the results to VA not later than 180 days after entering into the contract.

H.R. 643 would also require the survey to be designed to collect specified types of information about each individual surveyed, including:

- The highest level of education completed by the individual
- The military occupational specialty or specialties performed by the individual while they were serving in the Armed Forces
- Whether the individual has a service-connected disability
- The individual's opinion of the Transition Assistance Program (TAP), as well as the effectiveness of TAP, including the instruction on how to use VA benefits.
- The resources the individual used to help decide to go to school using his/her VA education benefits.
- The resources used to decide on the program of study in which to enroll.
- The individual's goal when he/she enrolled in the program of education.
- The nature of the individual's experience using VA's education benefits computer-processing systems.
- The nature of the individual's experience working with the certifying official at his or her school.
- Services or benefits provided by the school to the Veteran.
- Type of educational institution the individual attended.
- Whether the individual completed his/her program of study, the number of credit hours completed, and any degrees or certificates obtained.
- The employment status of the individual and whether that employment status was different prior to starting the program of study.

- Whether the individual was enrolled on a full-time or part-time basis.
- The individual's opinion on the effectiveness of the VA benefits program used to complete the program of study.
- Whether the individual was ever entitled to or used a rehabilitation program under Chapter 31.
- A description of any circumstances that prevented the individual from using the individual's entitlement to educational assistance to pursue a desired career path or degree.
- Whether the individual is using the individual's entitlement to educational assistance to pursue a program of education or training or has transferred such an entitlement to a dependent.
- Any other matters VA determines appropriate.

VA would submit a report to the Committees on the results of the survey not later than 90 days after receiving those results, and would include any recommendations related to the results of the survey. VA also would submit an unedited version of the results of the survey.

While VA supports the intent behind H.R. 643, the Benefits Assistance Service (BAS) program office in VA is currently administering a similar survey with the help of a private contractor, J.D. Power and Associates. The current survey collects much of the information required by this bill, although the survey would need to be modified to include questions about military occupational specialty; whether the Veteran has a service-connected disability; the effectiveness of TAP; the Veteran's experience with the school certifying official; the effectiveness of the Veteran's program of study; the

Veteran's experience with VA's computer systems; whether the Veteran has eligibility under VA's Chapter 31 vocational rehabilitation program; a description of any circumstances that prevented the individual from using the individual's entitlement to educational assistance to pursue a desired career path or degree; and whether the individual is using the individual's entitlement to educational assistance to pursue a program of education or training or has transferred such an entitlement to a dependent.

To prevent duplication of work, VA would investigate the feasibility of combining the requirements in H.R. 643 with VA's current survey within available resources, and would work with the Office of Management and Budget to change the survey in accordance with the Paperwork Reduction Act, as appropriate. VA would save expenditures by using the existing survey, as opposed to starting the process from the beginning. VA expects to receive results from the current survey by September 30, 2015.

VA would need one year from the date of enactment to complete the survey that would be required by the bill.

VA estimates that the GOE would be $263,000 to enter into a contract with a nongovernment entity to create a new survey of a statistically valid sample of individuals who have used or are using educational assistance under Chapters 30, 32, 33, and 35 of title 38,. Alternatively, VA estimates the GOE to incorporate the additional questions into the existing survey would be $62,000.

H.R. 1038

H.R. 1038 would amend chapter 7 of title 38 by adding section 714. This section would require VA to retain a copy of any reprimand or admonishment received by an employee of VA in the employee's permanent record (or Official Personnel File (OPF)) as long as the employee is employed by the Department.

While not stated, it is assumed the intent underlying the bill is to provide a basis for considering an employee's entire disciplinary history when proposing or deciding more serious forms of discipline/adverse action in the event of future infractions. The generally accepted practice throughout the federal government and by VA is that letters of admonishment and reprimand are not relied upon as prior offenses once they have been removed from the employee's OPF.

An admonishment is an official letter of censure issued to an employee for minor act(s) of misconduct or deficiency in competence. This letter normally remains in the employee's OPF for two years. After two years, admonishments are removed from the personnel folder and destroyed. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management (HRM) Officer that the admonishment be withdrawn if the employee's conduct so warrants.

A reprimand is an official letter of censure issued to an employee for an act of misconduct or deficiency in competence. A reprimand is a more severe disciplinary action than an admonishment, but the misconduct is not so egregious that a suspension or other adverse action is required to correct the conduct. This letter normally remains in the employee's personnel folder for three years. After three years, a reprimand will be removed from the employee's personnel folder and destroyed. The employee's

supervisor may, after two years, make a written request to the HRM Officer that the reprimand be withdrawn if the employee's conduct so warrants.

There is no current law or regulation that requires agencies to retain letters of admonishment or reprimand for a specific period of time. That determination is a matter of agency policy. It is the standard practice across the Federal government for letters of reprimand and/or admonishment to be retained on a time-limited basis. A review of several agencies' policies on disciplinary actions (Departments of Defense (DoD), Air Force, Navy and Agriculture) shows VA's current retention policy is consistent with those of other agencies. Further proof of the intent that these actions be time-limited can be found in Chapter 3 of the Office of Personnel Management's Guide to Personnel Recordkeeping which provides that "Temporary documents are documents not kept for the life of the personnel folder. These documents are filed on the left side (or in the 'Temporary' folder in electronic OPF) of the folder. Examples of material to be filed on the left side: Current position description; Standard Form 1152, Designation of Beneficiary for Unpaid Compensation; Letters of reprimand or caution."

The Merit Systems Protection Board (MSPB), through its countless rulings on employee appeals, identified factors agencies must consider when determining an appropriate penalty for conduct-based administrative actions. These are commonly referred to as "The Douglas Factors," and are based on *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). One of the Douglas Factors is the employee's past disciplinary record. Germane to the employee's past disciplinary record is the level or type of disciplinary action taken and the proximity of the prior discipline to the current misconduct. For example, a ten-year-old letter of admonishment issued to an employee

for unauthorized absence will have little relevance to a current infraction, especially if the employee had no further unauthorized absences or other disciplinary actions in the interim. In *Kehrier v. Department of Justice*, 27 M.S.P.R. 477, 480 n.1 (1985), the Board sustained the presiding judge who found the deciding official's reliance on a 1974 3-day suspension for insubordination "was too remote in time to be of significance with respect to the present charges." A suspension from duty without pay is a much more serious form of discipline than a letter of admonishment or a letter of reprimand, and the Notification of Personnel Action (SF-50) that is produced to effect a suspension is filed in the employee's OPF on the permanent side and is kept in the OPF for the life of the employee's federal career. Citing *Kehrier*, in *Jose Almanza v. Department of Veterans Affairs*, MSPB SF-0752-03-0332-I-1, the administrative judge noted that in determining the appropriate penalty "it is arguable that actions taken 12 or more years prior to the action at issue here . . . should not have been considered at all." Therefore, it is reasonable to conclude retention of letters of admonishment or reprimand for indefinite periods of time would do little to promote the efficiency of the service or benefit the Department in future disciplinary actions. Third parties apply little or no weight to prior discipline that is not within reasonable proximity to the current misconduct.

The proposed new section to Chapter 7 of title 38, "Record of reprimands and admonishments" would prevent managers from settling EEO and other workplace grievances with employees with terms that would limit the amount of time these documents remain in the employee's permanent record. It would also restrict the removal of these documents as a term of settlement. These are both frequently used settlement terms that resolve complaints before they go into costly and high-risk formal

litigation proceedings. These terms also allow managers a much needed tool to ensure continued good performance of employees because they are usually conditioned upon no further misconduct of the type that initially led to the reprimand or admonishment. Additionally, they support the notion of employee rehabilitation – and restricting their use provides no incentive for improved behavior. H.R. 1038, if enacted, also may have an unintended chilling effect on managers who, when faced with a decision to issue a letter of admonishment or reprimand for a minor infraction or to let the matter drop with just an oral warning, may elect to choose the lesser action in order to avoid leaving the employee with a permanent stain on his or her record.

Both VA policy and the provisions contained in VA's collective bargaining agreements provide adequate controls for addressing minor conduct issues. Indefinite retention of records of these types of actions in an employee's record does not provide the VA with any additional conduct management tools that it does not already possess. Further, the fact that H.R. 1038 only applies to VA seems punitive in nature rather than assistive.

For the reasons stated above the VA cannot support H.R. 1038.

H.R. 1141

H. R. 1141, the "GI Bill Fairness Act of 2015," would amend the term "active duty" under chapter 33 of title 38, to include certain time spent receiving medical care from the DoD as qualifying active duty service performed by members of the Reserve and National Guard. Under this bill, individuals ordered to active duty under section 12301(h) of title 10 to receive authorized medical care; to be medically evaluated for

disability or other purposes; or to complete a required DoD health care study, would receive creditable service under the Post-9/11 GI Bill.

H.R. 1141 would apply as if it were enacted immediately after the enactment of the Post-9/11 Veterans Educational Assistance Act of 2008 (Pub. L. 110–252).

VA defers to the DoD regarding the change to qualifying active duty service under the Post-9/11 GI Bill. Currently, individuals with qualifying active duty service of at least 30 continuous days who are honorably discharged due to a service-connected disability become eligible for 100 percent of the Post-9/11 GI Bill benefit. Because service under 10 U.S.C. § 12301(h) does not meet the current definition of active duty, those discharged Guard and Reserve members do not automatically qualify for 100 percent of the benefit. If enacted, this change would allow for an increase in benefits from the 40-90 percent benefit tier up to the 100 percent level, and the change would be retroactive to as early as August 1, 2009.

The proposed change to the eligibility criteria under the Post-9/11 GI Bill would require VA to make changes to the type of data that are exchanged between DoD and VA through the VA/DoD Identity Repository (VADIR) and displayed in the Veteran Information System (VIS). In addition, new rules would need to be programmed into the Post-9/11 GI Bill Long Term Solution (LTS) in order to calculate eligibility based on service under section 12301(h) and to allow for benefit payments retroactive to 2009. VA would need one year from enactment of H.R. 1141 to complete these changes.

VA estimates that GOE cost requirements associated with the enactment of H.R. 1141 would be insignificant. The Department is still evaluating the benefit costs associated with this legislation.

H.R. 1313

H.R. 1313, the "Service Disabled Veteran Owned Small Business Relief Act," would expand the flexibility provided to a service-disabled Veteran-owned small business (SDVOSB) to continue to hold that status upon the death of the service-disabled Veteran owner. Current law provides a transition period for SDVOSBs for up to 10 years after the Veteran's death, if the Veteran was 100 percent service-disabled or died as a result of the disability. This bill would make a similar transition period available for three years, if the Veteran was less than 100 percent disabled and the Veteran's death was not the result of the disability. In both cases, the surviving spouse is able to act as the owner, without losing SDVOSB eligibility.

This seems a reasonable approach. Without this transition period, the death of the Veteran owner could put at risk the jobs and livelihoods of the firm's employees, as well as the spouse. This enables the spouse a reasonable period of time to determine what should be done with the business after the Veteran's death.

VA estimates that the enactment of H. R. 1313 would entail minor administrative costs.

H.R. 1187

H.R. 1187 would amend 38 U.S.C. § 3703(a)(1) to adjust the maximum guaranty amount under the VA home loan program.

Under current law, the maximum guaranty amount is calculated as a percentage of the Freddie Mac conforming loan limit. Since lenders require VA's guaranty to cover at least 25 percent of the loan amount before they will make a loan, VA-guaranteed

loans are effectively capped at the Freddie Mac conforming loan limit, which varies by location. This legislation would eliminate the effective cap and make the maximum guaranty amount 25 percent of the loan amount, subject to previously used entitlement.

VA does not oppose H.R. 1187. The current effective loan limit prevents otherwise qualified Veterans from taking full advantage of VA-guaranteed home loans on high-cost properties and requires complicated calculations to determine the maximum guaranty amount. This draft bill would make the full VA home loan benefit available to more Veterans and simplify the maximum guaranty calculation for both Veterans and lenders. The no-down payment requirement has been a cornerstone of VA's home loan program and provides an incentive for Veterans to choose VA's home loan product. However, under current law, a Veteran who elects to purchase a home for an amount that exceeds the Freddie Mac conforming loan limit is required to make a down payment for the loan amount borrowed in excess of such limit. This is because lenders generally expect VA's guaranty to be in an amount that is at least 25 percent of the loan. If it is not, lenders require Veterans to make up the difference with a down payment to cover the difference. By removing the effective cap, the law would allow more Veterans to utilize the home loan benefit they have earned without a down payment, while still requiring that they have satisfactory credit and income to qualify for the loan.

VA estimates this legislation would have a credit subsidy cost of $1.9 million in 2017, $16.8 million over 5 years, and $51.5 million over 10 years. There would be no GOE costs associated with this draft bill.

Draft Legislation

This draft bill would amend VA's procurement authorities to allow a preference for offerors that employ Veterans, as determined by VA. VA's Veterans First Contracting Program is currently directed at Veteran entrepreneurs who own and control small businesses. Not all Veterans are ready to take the risks presented by entrepreneurship; in some cases, getting a stable, reliable income through sustained employment is a necessary first step. This proposal would broaden VA's ability to enhance Veteran economic opportunity and improve Veterans' ability to transition back into the civilian sector.

VA appreciates the flexibility that would be provided, to enable the Secretary to design an appropriate preference. The scope and variety of VA's procurement authorities and methodologies are extensive; as of February 21, 2015, VA reported more than 1.8 million contract actions for FY 2014, totaling over $19 billion, to the Federal Procurement Data System. A preference that makes sense in one context may be unsuitable for another context. This draft bill would provide the Secretary with appropriate discretion in carrying out the purpose of the preference.

However, while it is helpful to have flexibility, VA believes some aspects of this preference will need to be addressed legislatively, to provide statutory guidance as VA begins implementation. For example, when will the preference apply? VA recommends clarifying the scope of this term within the present Federal Acquisition Regulation (FAR) context. What constitutes an "employee" in qualifying for this preference? How would part-time employees be treated in this calculation? Would independent contractors be

counted in some way? Offerors will need clear guidance as to expectations so they can comply with the requirements.

The relationship between this program and existing Veteran employment requirements would also need clarification. For its part, DOL's Office of Federal Contract Compliance Programs carries out and enforces Veteran nondiscrimination and affirmative action requirements applicable to Federal contractors with regard to the employment of certain Veterans, as specified under section 4212 of title 38. While DOL already provides comprehensive guidance to contractors on these requirements, VA would need to coordinate with DOL to ensure that any guidance adequately explains to contractors how they may comply with both sets of requirements.

With respect to the draft bill's section 8129(b)(3), VA recommends allowance of a mitigating factor for debarment of any principals that initiate disclosure of the misrepresentation to the Secretary. A principal that becomes aware of a misrepresentation will have an incentive to protect himself or herself from debarment, by not cooperating with the violation and revealing it to the Government. This would complicate a firm's ability to carry out the misrepresentation in the first place, and create a strong additional incentive for compliance. It also is consistent with existing policy in the FAR that cites a contractor's self-disclosure of a violation as a mitigating factor in debarment cases (see FAR 9.406-1(a)(2)).

VA would be pleased to work with staff to provide technical assistance as requested.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. I would be happy to respond to questions you or the other Members of the Subcommittee may have regarding our views as presented.